No. 17-965

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ALLIANCE DEFENDING FREEDOM AS AMICUS CURIAE SUPPORTING NEITHER PARTY

Kristen K. Waggoner
Jonathan A. Scruggs
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

David A. Cortman
Counsel of Record
Rory T. Gray
Alliance Defending Freedom
1000 Hurricane Shoals Rd. N.E., Ste. D-1100
Lawrenceville, GA 30043
dcortman@ADFlegal.org
(770) 339-0774

Counsel for Amicus Curiae

QUESTION PRESENTED

Amicus addresses only the question of whether Proclamation No. 9645 violates the Establishment Clause and takes no position on the other issues presented in this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

BACKGROUND 3

ARGUMENT 9

I. This Court Should Evaluate First Amendment Compliance Based On a Historical Understanding of What It Means to Institute an "Establishment of Religion." 9

II. The Court Should Explicitly Overrule the *Lemon* Test, Which Elevates Intent Over Substance and Results in Judicial Micromanagement of Political Affairs. 12

III. Even Under the Discredited *Lemon* Test, the Fourth Circuit's Analysis is Flawed. 15

A. The Fourth Circuit's Inquiry is Based On Irrelevant and Unreliable Evidence. 18

B. The Fourth Circuit Engaged in Impermissible Psychoanalysis of the President's Heart of Hearts. 21

C. The Fourth Circuit Failed to Give Any Deference to the Government's Express National Security Purpose. 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Am. Atheists, Inc. v. Davenport,
637 F.3d 1095 (10th Cir. 2010).....14

Bd. of Educ. of Westside Cmty. Sch. v. Mergens,
496 U.S. 226 (1990).....10

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993).....14

Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter,
492 U.S. 573 (1989)..... 5-6, 10-11, 14-15

Epperson v. Arkansas,
393 U.S. 97 (1968).....16

Felix v. City of Bloomfield,
847 F.3d 1214 (10th Cir. 2017).....10

Hamdan v. Rumsfeld,
548 U.S. 557 (2006).....20

Hawaii v. Trump,
859 F.3d 741 (9th Cir. 2017) 5

Hawaii v. Trump,
878 F.3d 662 (9th Cir. 2017) 7

Int'l Refugee Assistance Project v. Trump,
857 F.3d 554 (4th Cir. 2017) 5-6

Int'l Refugee Assistance Project v. Trump,
__ F.3d __, 2018 WL 894413 (4th Cir. Feb. 15, 2018) ..... *passim*

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 12

Lemon v. Kurtzman,
403 U.S. 602 (1971) ..... *passim*

Lynch v. Donnelly,
465 U.S. 668 (1984) 9, 16

McCreary Cnty. v. ACLU of Ky.,
545 U.S. 844 (2005) ..... *passim*

Mueller v. Allen,
463 U.S. 388 (1983) 21-22

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 16-17

Stone v. Graham,
449 U.S. 39 (1980) 16

Town of Greece v. Galloway,
134 S. Ct. 1811 (2014) 15

Trump v. Int'l Refugee Assistance Project,
137 S. Ct. 2080 (2017) 6

Utah Highway Patrol Ass'n v. Am. Atheists, Inc.,
132 S. Ct. 12 (2011) 12

Van Orden v. Perry,
545 U.S. 677 (2005).....12

Wallace v. Jaffree,
472 U.S. 38 (1985).....16

Regulations

82 Fed. Reg. 8,977 (Jan. 27, 2017)..... 3-6, 8

82 Fed. Reg. 13,209 (Mar. 6, 2017)..... 4-8

82 Fed. Reg. 45,161 (Sept. 27, 2017) .....*passim*

Other Authorities

3 Story, *Commentaries on the Constitution of the United States* 728 (1833).....9

Becket Adams, *Did Obama Camp Flat-Out Lie About the Contraception Mandate by Posting This 'Permission Slip?,'* The Blaze (Mar. 2, 2012), https://goo.gl/p2wnmH 19

Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Har. J.L. & Pub. Pol'y 61 (1994).....13

Janell Ross, *Obama revives his 'cling to guns or religion' analysis – for Donald Trump Supporters*, The Washington Post (Dec. 21, 2015), https://goo.gl/GvfGpD.....19

John Van Voorhis, *Elizabeth I and Her Parliaments: 1584-1601,* 68 Yale LJ. 1727 (1959) 21

Marc Thiessen, *Hillary Clinton is a threat to religious liberty,* The Washington Post (Oct. 13, 2016), https://goo.gl/DaKYf9 19

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 Wm. & Mary L. Rev. 2105 (2003) 10

INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom ("ADF") is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect First Amendment freedoms. Since its founding in 1994, Alliance Defending Freedom has played a role in many cases before this Court, including *National Institute of Family and Life Advocates v. Becerra*, S. Ct. No. 16-1140 (argument set for Mar. 20, 2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, S. Ct. No. 16-111 (argued on Dec. 5, 2017); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011); as well as hundreds of other cases in lower courts.

ADF takes no position on Proclamation No. 9645 as a matter of immigration or national security policy. It also takes no position on Respondents' challenge under the Immigration and Nationality Act or any constitutional basis except the Establishment Clause. Many of ADF's cases involve the proper application of

---

[1] Petitioners filed a blanket consent to amicus curiae briefs in support of either or of neither party. Respondents consented to the filing of this brief. Documentation reflecting that consent is on file with the Clerk. Pursuant to S. Ct. R. 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Establishment Clause. ADF represents individuals, churches, religious organizations, local governments, and other entities who are directly affected by this Court's Establishment Clause jurisprudence. The test that governs Establishment Clause claims is therefore of vital importance to ADF's clients. ADF seeks to promote an accurate view of the Establishment Clause to ensure that its clients may appropriately acknowledge our country's religious heritage and the important role that religion continues to play in our national life.

SUMMARY OF ARGUMENT

Historically, the Establishment Clause's main purpose was to bar Congress from instituting a national church and to protect the religious establishments that existed in several states. But it has now become a weapon for political opponents to use in scuttling policy decisions they dislike. And they may do so effortlessly by claiming that a government actor had a subjective religious purpose. This Court should not tolerate such gamesmanship. The time has come to explicitly jettison the *Lemon* test and lay down an objective standard that comports with the Establishment Clause's plain text and historical meaning, and which gives significant weight to our nation's heritage.

Lemon, as modified by the endorsement test, is flawed at its foundations. It trades objective fact for subjective intent—and even then not officials' actual intent or purpose but what a fictional observer might wrongly believe that intent to be. All this accomplishes is muddying the waters and preventing

any meaningful inquiry into whether the government has coerced anyone to support or participate in religious activity, or given direct benefits to religion to such a degree that it establishes a state faith or tends to do so. Because *Lemon* trades in *feelings* of isolation rather than *actual* government coercion or penalties based on citizens' religious choices, it should be explicitly overruled.

Nevertheless, the Fourth Circuit has misconstrued *Lemon*'s purpose inquiry and *McCreary County*'s more stringent variant of that test by departing from this Court's guidance and nitpicking from irrelevant and unreliable evidence. There is simply no justification for barring the Executive Branch's implementation of its immigration and national security policies based on tweets, public relations puff, and video posts. Courts are not empowered to sift unofficial and passing comments in search of evidence discrediting officials' heart of hearts. And permitting them to do so would result in lower courts stymieing policies established by both Republican and Democrat presidents alike.

BACKGROUND

In January 2017, President Trump issued Executive Order No. 13769 ("EO-1"), which, among other things, instructed the Secretary of Homeland Security—in consultation with the Secretary of State and the Director of National Intelligence—to determine which countries fail to provide adequate information to conduct security screening of their nationals for purposes of issuing visas to enter the United States. *See* Executive Order No. 13769,

Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8,977 (Jan. 27, 2017). The order suspended for 90 days—with certain exceptions—the entry of foreign nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. EO-1 stated that this action was necessary to ensure that visa applicants were appropriately security screened and to temporarily reduce the investigative burden placed on Executive agencies conducting a worldwide security review. Furthermore, the order suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and reduced the number of refugees eligible for admission to the United States in 2017.

EO-1 was quickly challenged in lower federal courts and enjoined on various grounds. Rather than continuing to litigate EO-1, the government announced that it would issue a new executive order. The President issued Executive Order No. 13780 ("EO-2") roughly two months after the promulgation of EO-1. *See* Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13,209 (Mar. 6, 2017). EO-2 addressed several judicial concerns raised about EO-1 by stating its purpose—*i.e.*, to prevent terrorist attacks—and factual bases—*i.e.*, terrorist-friendly conditions in six particular nations.

In substance, EO-2—among other things—required the Secretary of Homeland Security in concert with other Executive Branch officials to conduct a global review of whether foreign governments provide adequate information to perform security checks on visa applicants. EO-2 also

suspended for 90 days the entry of nationals from six of the seven countries identified in EO-1 as posing terrorism-related concerns: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The order stated these actions were necessary to ensure that dangerous individuals do not enter the United States while the Executive Branch was assessing security standards and to temporarily lessen the investigative burden on agencies conducting a worldwide security review. Further, the order suspended USRAP-application decisions for 120 days and instructed the Secretary of State to determine whether additional procedures were necessary to identify USRAP applicants who may pose a security threat.

EO-2 was also challenged in lower federal courts on several grounds, including that it violated the Establishment Clause. The Ninth Circuit did not reach that First Amendment claim. *See Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017). But the en banc Fourth Circuit affirmed a preliminary injunction that barred the Executive Branch from enforcing EO-2's suspension of entry provision based on a violation of the Establishment Clause. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (en banc). Applying the first prong of the *Lemon* test,[2]

---

[2] *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.") (internal citations and quotation omitted); *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94, 620 (1989) (discussing the "reasonable observer" standard under the endorsement test, which modified *Lemon*); *Cnty. of Allegheny*,

the Fourth Circuit asked whether a reasonable observer would perceive EO-2's primary purpose as religious animus. It held that statements made by the President—largely as a candidate for office—showed that EO-1 and EO-2 were primarily intended to exclude Muslims from the United States. *Id.* at 595. While the Fourth Circuit accepted that national security concerns *could* have motivated the President to issue EO-2, it held that the President's desire to prevent terrorist attacks was secondary to his anti-Muslim animus. *Id.* As a result, the court held that EO-2 violated the Establishment Clause. *Id.* at 601.

This Court granted review in both the Fourth and Ninth Circuit cases in May 2017 and consolidated them for argument in October 2017. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2086 (2017). Before oral arguments took place, the Executive Branch completed its worldwide security review. The President then received input from the Acting Secretary of Homeland Security, the Secretary of State, the Attorney General, among others, and issued Proclamation No. 9645 in September 2017 (the "Proclamation"). *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

The Proclamation states that it imposes restrictions on the entry of foreign nationals from eight countries because they are either unable or unwilling to employ reliable travel documents and adequate information-sharing or identity-management procedures: Chad, Iran, Libya, North

---

492 U.S. at 630-32 (O'Connor, J., concurring in part and concurring in the judgment) (discussing the endorsement test).

Korea, Somalia, Syria, Venezuela, and Yemen. The Proclamation's restrictions on entry are not uniform but vary as to each particular nation listed. For instance, nationals of countries that refuse to cooperate regularly with the United States (*e.g.*, Iran, North Korea, and Syria) are subject to greater restrictions on entry than nationals of countries that are valuable partners of the United States but which the order states suffer from information-sharing deficiencies (*e.g.*, Chad, Libya, and Yemen).

The President's issuance of the Proclamation rendered the legal challenges to EO-2 moot. Accordingly, this Court vacated the Fourth and Ninth Circuits' judgments and remanded for the courts of appeals to dismiss the challenges to EO-2 without expressing a view on their merits. Again, lower court challenges were brought to the current Proclamation on multiple grounds, including an alleged violation of the Establishment Clause. The Ninth Circuit, in the present case, did not reach this First Amendment claim. *See Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017). Nonetheless, when this Court granted review, it instructed the parties to address the question of whether the Proclamation violates the Establishment Clause.

The en banc Fourth Circuit subsequently ruled on the challengers' Establishment Clause claim. *See Int'l Refugee Assistance Project v. Trump*, __ F.3d __, 2018 WL 894413 (4th Cir. Feb. 15, 2018) (en banc). Citing "disparaging comments and tweets regarding Muslims" by the President (this time only during his term of office) and a resulting violation of the Establishment Clause, the en banc Fourth Circuit

affirmed a preliminary injunction enjoining the Executive Branch from enforcing the Proclamation as to nationals of Chad, Iran, Libya, Somalia, Syria, and Yemen. *Id.* at *13, 20. However, the Fourth Circuit allowed the Proclamation's restrictions to be enforced against nationals of North Korea and Venezuela because they are not majority-Muslim nations; accordingly, no Establishment Clause violation was alleged as to them. *Id.* at *20.

In so ruling, the en banc Fourth Circuit asked whether the Proclamation's primary purpose was secular from the perspective of an "objective observer." *Id.* at *14. The court recounted various tweets from the President indicating that his goals had not changed since the first executive order was issued and that he favored tougher restrictions on immigration, such as EO-1, over the "watered down" and "politically correct" EO-2, as well as tweets in which the President shared three videos portraying defacement or violence, which the court of appeals deemed "anti-Muslim." *Id.* at *15.

Based on this evidence, the Fourth Circuit held that "an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States." *Id.* at *16. This conclusion was not altered by the fact that the Proclamation's process and substance were different from that of EO-1 and EO-2 because the President did not "cure the 'taint' that [it] found infected EO-2." *Id.* Further, the en banc Fourth Circuit deemed the Executive Branch's multi-agency review to be irrelevant to its Establishment Clause analysis. Because the

government refused to make its global security assessments "publicly available," the "reasonable observer [had] no basis to rely on the review." *Id.*

Judges Niemeyer, Traxler, and Agee, and Senior Judge Shedd dissented. They would have held that the Proclamation resulted in no Establishment Clause breach. *See id.* at *85-106.

ARGUMENT

I. This Court Should Evaluate First Amendment Compliance Based On a Historical Understanding of What It Means to Institute an "Establishment of Religion."

The Founders created the Establishment Clause primarily to bar the institution of a national church. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (explaining that the First Amendment "'prevent[s] any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government'" (quoting 3 Story, Commentaries on the Constitution of the United States 728 (1833))). Yet that structural shield has become a sword used to invalidate decisions that political opponents (and lower courts) dislike. The need to return to a historical understanding of the Establishment Clause has never been more clear.

Centuries have dimmed Americans' familiarity with the makings of an established church. But those qualities are just as identifiable today as they were when the First Amendment was ratified. American colonies and later states with established churches

typically (1) compelled religious observance, (2) provided financial support directly and solely to religious ministry, (3) controlled the selection of religious personnel, (4) mandated correct forms of religious teaching and practice, (5) gave certain civic powers exclusively to church officials, and (6) penalized those who did not belong to the established church. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116-19, 2131 (2003); *see also Felix v. City of Bloomfield*, 847 F.3d 1214, 1215-18 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc).

Members of this Court have distilled these historical components of a religious establishment into two overarching principles: government may not coerce anyone to support or participate in religion or its exercise, or grant direct benefits to religion to such a degree that it actually establishes a state religion or faith or tends to do so. *See, e.g., Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 260 (1990) (Kennedy, J., concurring in part and concurring in the judgment); *Cnty. of Allegheny*, 492 U.S. at 659 (Kennedy, J.).[3] These guidelines are designed to root out whether a religious establishment—or a tendency toward one—exists in keeping with the Establishment Clause's plain text. *Cnty. of Allegheny*, 492 U.S. at 662 (Kennedy, J.). And they give appropriate weight to our national heritage

---

[3] Justice Kennedy's opinion in *Mergens* was joined by Justice Scalia, while his opinion in *County of Allegheny* was joined by Chief Justice Rehnquist and Justices White and Scalia.

and practices that have proven uncontroversial for most of our history. *Id.* at 662-63.

Whether or not the Proclamation ultimately violates the Establishment Clause, the Fourth Circuit's analysis was incorrect. It should have asked whether the Proclamation (1) coerces foreign nationals to observe or participate in any religious activity; *id.* at 664; (2) serves the cause of any particular religious faith, *id.*; (3) benefits or burdens foreign nationals based on their religious choices, *id.* at 659-60; or (4) takes some other identifiable step towards a historical religious establishment, *id.* at 664. Because the Proclamation's terms apply to all citizens of particular nations regardless of whether they subscribe to a majority or minority faith, or none at all, Respondents face an uphill battle in substantiating their First Amendment claim.

The Fourth Circuit's en banc opinion also woefully neglects our history and tradition of separate but equal powers. *See id.* at 669 (explaining that Establishment Clause jurisprudence should "reach[] results consistent with history"). For over 240 years the Executive Branch's immigration, defense, and foreign policy decisions have not been thought to implicate the Establishment Clause, regardless of a country's or region's majority faith. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *103 (Niemeyer, J., dissenting). Otherwise, a lower court could seek to invalidate the war in Afghanistan (prosecuted by both Republican and Democrat Presidents alike) under the Establishment Clause because it deemed the perpetuation of that conflict a symptom of anti-Muslim animus. The en banc Fourth

Circuit's ruling would permit this unprecedented result and yet that court gave no persuasive reason why the Establishment Clause should even apply.

II. The Court Should Explicitly Overrule the *Lemon* Test, Which Elevates Intent Over Substance and Results in Judicial Micromanagement of Political Affairs.

Few constitutional standards in the history of the Republic have garnered as much criticism and judicial misgivings as the *Lemon* test. *See, e.g., Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting from the denial of certiorari); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397 (1993) (Kennedy, J., concurring in part and concurring in the judgment); *Lamb's Chapel*, 508 U.S. at 397-401 (Scalia, J., concurring in the judgment). This Court routinely ignores or declines to apply it, although some lower courts feel duty bound to continue doing so. *See Utah Highway Patrol Ass'n*, 132 S. Ct. at 14-16 (Thomas, J.). Now, for the first time, the Fourth Circuit has decided that *Lemon*'s first prong empowers courts to ignore a presidential order's stated purpose of preventing terrorist attacks and scuttle that order—whether one agrees or disagrees with its substance—based on tweets and media statements. No more evidence is needed that the *Lemon* test should be explicitly overruled.

The problems with *Lemon* as modified by the endorsement test are legion. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 694-98 (2005) (Thomas, J., concurring). Amicus limits its discussion to two of

Lemon's most basic faults. First, an establishment of religion is an objective fact. Government action either tends to establish a state religion or faith or it does not. Under *Lemon*'s first prong, that focus on tangible reality is lost. Courts analyze instead the observed purpose or intent of officials' actions. *See, e.g., Int'l Refugee Assistance Project*, 2018 WL 894413, at *14 (examining the Proclamation's "primary purpose). Divining the intent behind an action taken by or with the input of a host of government officials is, at best, an elusive and, at worst, an impossible, task. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Har. J.L. & Pub. Pol'y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

Moreover, *Lemon's* emphasis on subjective intent is entirely misplaced. Officials may intend a government act to further a religious establishment but if no real step towards an establishment of religion actually occurs as a result, the Establishment Clause is not implicated. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting) ("[I]t is an odd jurisprudence that bases the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so.").

Second, the *Lemon* test does not even focus on officials' true intent but on what a "reasonable observer" would (perhaps wrongly) perceive their purpose to be. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *16 ("[A]n objective observer could conclude that the President's repeated statements convey the primary purpose of the

Proclamation—to exclude Muslims from the United States."). No justification exists for grounding violations of the Constitution in imaginary observers' misguided beliefs.[4] *See McCreary Cnty.*, 545 U.S. at 901 (Scalia, J.) (rejecting any possibility that "the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer"); *Cnty. of Allegheny*, 492 U.S. at 669 (Kennedy, J.) (explaining "the endorsement test is flawed in its fundaments and unworkable in practice"). That is doubly true when lower courts routinely adopt the vantage point of decidedly unreasonable observers who are "biased, replete with foibles, and prone to mistake." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1108 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc).

The Establishment Clause's true and vital purpose is to bar government from *actually* making citizens political outsiders by coercing or penalizing

---

[4] It is true that courts sometimes look to intent in the Free Exercise and Equal Protection contexts. Unlike the Establishment Clause's structural protection, the Free Exercise and Equal Protection Clauses prevent the government from burdening the liberty of particular citizens, whether through coercion or some other discriminatory act. The modified *Lemon* test, however, allows for the finding of a state "establishment of religion" based on mere perceptions of endorsement. Moreover, intent-based inquiries in the Free Exercise and Equal Protection contexts relate to officials' *actual* discriminatory intent, not the *subjective* intent a fictional "reasonable observer" might wrongly perceive. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (Kennedy, J.) ("Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence.").

their religious choices. Feelings of isolation, however unfortunate, are simply incapable of making out a violation of our nation's fundamental law. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) ("Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views ....").

In short, the *Lemon* test elevates intent over substance and perception over reality. This "trivialize[s] constitutional adjudication," *Cnty. of Allegheny*, 492 U.S. at 674 (Kennedy, J.), and invites lower courts to micromanage political affairs. *Lemon*'s flaws are fully illustrated by the Fourth Circuit's barring of the Executive Branch from pursuing its immigration and national security policies based on a fictive observer's perception of "religious animosity." *Int'l Refugee Assistance Project*, 2018 WL 894413, *17 (quotation omitted). This Court should explicitly overrule *Lemon* before it does any further damage and adopt a historically-based Establishment Clause test that allows judicial opinions to be grounded not in guesswork but in "consistently applied principle." *McCreary Cnty.*, 545 U.S. at 891 (Scalia, J.).

III. Even Under the Discredited *Lemon* Test, the Fourth Circuit's Analysis is Flawed.

Even if this Court applies the discredited *Lemon* test, the Fourth Circuit applied that test incorrectly. *Lemon's* first prong merely requires that a government action have "a secular legislative

purpose." *Lemon*, 403 U.S. at 612. In *Lemon* itself, this Court answered the question of whether two states had a secular purpose for providing aid to nonpublic schools by pointing to the intent reflected in "the statues themselves," which was to enhance the quality of secular education in all schools. *Id.* at 613. The *Lemon* Court saw "no reason to believe the legislatures meant anything else" by passing the laws, gave the legislatures' stated intent "appropriate deference," and swiftly concluded that the statutes had a secular purpose. *Id.* at 613.

The author of *Lemon*, Chief Justice Burger, later clarified in *Lynch*, that *Lemon's* first prong presents a "narrow question." 465 U.S. at 681. He explained that this Court had "invalidated legislation or governmental action on the ground that a secular purpose was lacking ... only when ... there was no question that the statute or activity was motivated wholly be religious considerations." *Id.* at 680; *see also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("[T]he First Amendment requires that a statue must be invalidated if it is *entirely motivated* by a purpose to advance religion.") (emphasis added).

For years before and after *Lemon*, this was undeniably true. *See, e.g.*, *Wallace*, 472 U.S. at 57 ("[T]he statute had *no* secular purpose."); *Stone v. Graham*, 449 U.S. 39, 42 (1980) ("Posting of religious texts on the wall serves no ... educational function."); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) ("No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens."); *Sch. Dist.*

of Abington Twp. v. Schempp, 374 U.S. 203, 224 (1963) ("[T]he religious character of the exercise was admitted by the State.").

Then came *McCreary County*, a decision in which a bare majority of this Court reinterpreted *Lemon*'s first prong to require the government to show not that it had *a* secular purpose but a *primary* one. *See* 545 U.S. at 864-65 (demanding that the government's secular purpose "not [be] merely secondary to a religious objective" or "predominantly religious"). Although this "new demand that secular purpose predominate contradicts *Lemon's* more limited requirement, and finds no support in [this Court's] cases," *id.* at 901 (Scalia, J.), for argument's sake Amicus will assume that it applies here.

The Fourth Circuit's en banc opinion exceeds the bounds of even *McCreary County*'s stringent version of the *Lemon* test. First, *McCreary County* characterized the purpose test as "straightforward" because it turns on objective factors directly tied to specific government acts, such as a law's "text" or the nature of "the government action itself." 545 U.S. at 862. What counts, in other words, are "official act[s]" like the "text, legislative, history, and implementation of the" law. *Id.* at 863 (quotation omitted). That safeguard is what ostensibly ensures that the *Lemon* test's results are not wholly "unpredictable or disingenuous." *Id.* at 862. Second, *McCreary County* rejected generalized and subjective attempts to divine intent from officials' ideological commitments or "heart of hearts." *Id.* Third, *McCreary County* recognized that the Court usually

"accept[s] governmental statements of purpose, in keeping with the respect owed" to elected officials. *Id.* at 865.

As outlined below, the Fourth Circuit's analysis flouts each of these principles.

A. The Fourth Circuit's Inquiry is Based On Irrelevant and Unreliable Evidence.

Failing meaningfully to consider objective factors like the Proclamation's text, the global security review on which it was based, and the order's real world effect, the Fourth Circuit looked to Twitter feeds, political salesmanship, and the original source of online videos. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *15-16. Such informal minutiae cannot establish that the Executive Branch had a primary religious purpose for issuing the Proclamation. Under *McCreary County*, the *only* evidence that is relevant is official government acts, 545 U.S. at 845, 862, and online rhetoric spouted in 280 characters or less, public relations pitches, and shared videos do not qualify. If they held weight, lower courts could engage in a nitpicking review of the entire record to substantiate the preconceived notion that a religious purpose exists. *Cf. id.* at 902, 908 (Scalia, J.) (warning against converting the purpose test's "limited inquiry into a rigorous review of the full record" and "making the passing comments of every government official the subject of endless litigation").

That *Lemon's* purpose inquiry should be limited to official government acts is demonstrated by putting the shoe on the other foot. President Trump is hardly

alone in making comments that some would deem hostile to their faith. President Obama's remark that some Americans "cling to guns or religion ... as a way to explain their frustrations" is well known. Janell Ross, *Obama revives his 'cling to guns or religion' analysis – for Donald Trump Supporters*, The Washington Post (Dec. 21, 2015), https://goo.gl/GvfGpD. Also infamous is two-time presidential candidate Hillary Clinton's statement that certain "deep-seated cultural codes, religious beliefs and structural biases have to be changed." Marc Thiessen, *Hillary Clinton is a threat to religious liberty*, The Washington Post (Oct. 13, 2016), https://goo.gl/DaKYf9.

Respondent's unprecedented Establishment Clause theory could lead not only to the Proclamation's invalidation here but also to lower courts striking down prized orders by Democrat presidents. For instance, some viewed applying the Affordable Care Act's contraception mandate to religious objectors as an indefensible burden chiefly grounded in religious animus. And President Obama's campaign bolstered that perception by issuing a Tumblr post that mocked business owners who object to the mandate based on their "personal beliefs." Becket Adams, *Did Obama Camp Flat-Out Lie About the Contraception Mandate by Posting This 'Permission Slip?,'* The Blaze (Mar. 2, 2012), https://goo.gl/p2wnmH.

Furthermore, evidence of purpose apart from directly related official acts is inherently unreliable. Political opponents can always find a tweet, PR

statement, media interview, or campaign rhetoric (which the Fourth Circuit earlier stressed) to support the set notion that a primary religious purpose is at play. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *102 (Niemeyer, J., dissenting) (noting that these statements "are unbounded resources by which to find intent of various kinds"). Such informal and impulsive musings simply are not trustworthy. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 n.52 (2006) (explaining that the Court does not credit media hype in "evaluating the legality of executive action"). Nor do these kinds of statements necessarily reflect an official's thinking during the appropriate timeframe. Officials, not candidates, take oaths of office and are surrounded by a vast government apparatus composed of other office holders and experts in their respective fields. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *102 (Niemeyer, J., dissenting).

The key official acts here are (1) the promulgation of the Proclamation's text, which appears to give a straightforward antiterrorism rationale for restrictions designed to address particular security ills; (2) a worldwide security review process undertaken by federal agencies and input solicited from cabinet-level officials, which certainly could suggest a genuine national security concern; and (3) the Proclamation's real world effect, which is to restrict the entry of foreign nationals based on their country of origin, regardless of whether they are religious believers, atheists, or agnostics. But the Fourth Circuit failed to accord these official acts any substantial weight.

B. The Fourth Circuit Engaged in Impermissible Psychoanalysis of the President's Heart of Hearts.

Opening windows into men's souls has long been regarded as an unseemly business. *See* John Van Voorhis, *Elizabeth I and Her Parliaments: 1584-1601*, 68 Yale L.J. 1727, 1732 (1959) (discussing Elizabeth I's statement that she would "open no window into men's souls"). That is why *McCreary County* rejected assembling disjointed evidence of "a drafter's heart of hearts" in order to vilify his or her motive for engaging in an official act. 545 U.S. at 862; *cf. id.* at 863 (discounting reliance on an official's "veiled psyche"). But that is precisely what the en banc Fourth Circuit did by trolling through the President's online musings, even going so far as to investigate and condemn his shared video posts. *See Int'l Refugee Assistance Project*, 2018 WL 894413, at *15-16. A dispassionate inquiry based on directly relevant objective evidence, not cherry-picking indications of an official's deepest mind, is what *McCreary County* requires.

C. The Fourth Circuit Failed to Give Any Deference to the Government's Express National Security Purpose.

No matter the impact "purpose" plays in Establishment Clause analysis, *McCreary County* requires courts to give "respect ... in the first instance to ... official claims." 545 U.S. at 865. Only in the most "unusual cases" should they be disregarded. *Id.* And rightly so, for this Court has always been "reluctan[t] to attribute unconstitutional motives" to

government officials, especially when "a plausible secular purposes" is apparent on a law's face. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

Here, there is at least a plausible argument that the Proclamation's primary purpose is to protect national security. The Proclamation's plain text reveals why. It imposes restrictions on the entry of foreign nationals from a handful of countries tailored to specific deficiencies identified by the Executive Branch's global security review, such as unreliable travel documents or inadequate information-sharing procedures. *See* 82 Fed. Reg. at 45,162-67. Given the September 11, 2011 and other attacks by foreign nationals on United States soil, the government's express antiterrorism concerns are not incredible; accordingly, they should receive some deference. Instead, the Fourth Circuit criticized the Executive Branch for not making its security assessments, which are based on classified information, public. *Int'l Refugee Assistance Project*, 2018 WL 894413, at *16. No matter the Proclamation's ultimate fate, even *McCreary County* requires the Fourth Circuit to give more deference to the order's plain text and stated primary purpose than it did.

CONCLUSION

Establishment Clause jurisprudence is in disarray. This Court should not make things worse by extending the *Lemon* test further than ever before. Instead, this Court should explicitly reject the *Lemon* test and adopt a legal standard in line with the Establishment Clause's plain text and historical meaning. But even if this Court applies *Lemon*'s first

prong or *McCreary County*'s more rigorous purpose test, it should give significantly more weight to formal government acts than 280-character tweets and online video shares. In sum, however this Court resolves the Establishment Clause question, it should reject—in no uncertain terms—the Fourth Circuit's erroneous form of analysis.

Respectfully submitted,

DAVID A. CORTMAN
Counsel of Record
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd., NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339–0774
dcortman@ADFlegal.org

KRISTEN K. WAGGONER
JONATHAN A. SCRUGGS
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444–0020

February 28, 2018